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FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 22, 2008

AGENDA ITEM
For Meeting of: 01-24-08

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan TPD
General Counsel

Rosemary C. Smith RCS
Associate General Counsel

Ron B. Katwan RBK
Assistant General Counsel

Esa L. Sferra ELS
Attorney

Subject: Draft AO 2007-32

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 24, 2008.

Attachment

ADVISORY OPINION 2007-32

DRAFT

Bradley A. Smith
Stephen M. Hoersting
Center for Competitive Politics
1800 Diagonal Road
Suite 600
Alexandria, VA 22314

William H. "Chip" Mellor
Steven Simpson
Paul M. Sherman
Institute for Justice
901 North Glebe Road
Suite 900
Arlington, VA 22203

Dear Messrs. Smith, Hoersting, Mellor, Simpson, and Sherman:

We are responding to your advisory opinion request on behalf of SpeechNow.org ("SpeechNow") concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"), and Commission regulations to SpeechNow's status as a political committee and funds received by SpeechNow.

The Commission concludes that once SpeechNow receives in excess of $1,000 in contributions or makes in excess of $1,000 in expenditures in one calendar year, it would satisfy the statutory definition of "political committee" and would have to register as a political committee because its major purpose is Federal campaign activity. The Commission also concludes that funds received by SpeechNow would constitute contributions, as defined in the Act and Commission regulations, and would be subject to the Act's amount limitations on individuals' contributions to political committees, including the individual biennial aggregate contribution limit.

1 ***Background***

2 The facts presented in this advisory opinion are based on your letters received on
3 November 19, 27, and 29, 2007, and information on SpeechNow's website.[1]

4 SpeechNow is organized under the laws of the District of Columbia as an
5 unincorporated non-profit association and under Section 527 of the Internal Revenue
6 Code. SpeechNow is dedicated to "promoting and protecting Americans' First
7 Amendment right of free speech, association, and assembly." Its "mission and major
8 purpose is to advocate the election of candidates – in the 2008, 2010, and future federal
9 election cycles – who favor returning America to the state of political freedom and
10 advocate the defeat of candidates who favor speech restrictions in the name of campaign
11 finance reform."

12 SpeechNow was founded by five individuals who are SpeechNow's only
13 participants. Other individuals may join the organization if elected to join by the current
14 participants. SpeechNow will operate and conduct its activities wholly independently of
15 candidates, political party committees, and other political committees. Provisions of its
16 bylaws ("Bylaws") prohibit SpeechNow and its participants from certain activities that
17 might compromise the independence of its activities, such as using a vendor that is also
18 used by a Federal candidate, hiring a former employee of a Federal candidate, or
19 communicating with candidates about their campaign needs or SpeechNow's activities.
20 *See* Bylaws Art. X. SpeechNow will not make any contribution to any candidate or
21 political committee. *See* Bylaws Art. VI, Sec. 10.

[1] www.SpeechNow.org (last viewed on Jan. 9, 2008).

1 SpeechNow will rely solely on funds from individuals to pay for its activities and
2 administrative costs. Four individuals have already indicated they would like to give
3 amounts ranging from $5,500 to $110,000, and SpeechNow would like to accept these
4 funds. To date, however, SpeechNow has accepted less than $1,000 total. SpeechNow
5 will not accept any funds from candidates, and will not accept, directly or indirectly, any
6 funds or anything of value from political committees or from corporations, labor
7 organizations, national banks, Federal government contractors, or foreign nationals.
8 SpeechNow plans to solicit individuals using two proposed solicitations
9 ("Solicitation 1" and "Solicitation 2") that request that individuals give their "maximum"
10 amount to SpeechNow and that state that SpeechNow "operate[s] independently of any
11 candidate and expressly advocate[s] to other people to vote for federal candidates who
12 support these First Amendment rights and to vote against candidates who oppose such
13 rights." The two proposed solicitations are identical, except that Solicitation 2 also states
14 that SpeechNow plans to oppose the election of two specific Federal candidates,
15 Representative Dan Burton and Senator Mary Landrieu, in the 2008 election.
16 During the 2008 election, SpeechNow plans to pay for political advertisements
17 supporting and opposing four specific Federal candidates. It has prepared four political
18 advertisement scripts, and the company retained to produce the proposed advertisements
19 and reserve television airtime, The Traz Group, estimates production costs to be $12,000
20 and the cost of airing the advertisements to exceed $150,000.
21 SpeechNow plans to place "disclaimers" on its solicitations and political
22 advertisements in accordance with 2 U.S.C. 441d(d)(2), and to report its spending for its

political advertisements as "independent expenditures" in accordance with 2 U.S.C. 434(c).

Questions Presented

1. *Are funds received and amounts disbursed by SpeechNow "contributions" and "expenditures" under 2 U.S.C. 431(8) and 431(9)?*

2. *Must SpeechNow register as a political committee:*

    a. *Before accepting "contributions," or making "expenditures," in excess of $1,000 because its major purpose is to influence the election or defeat of candidates for Federal office?*

    b. *After it has received more than $1,000 from individuals who are informed that the purpose of SpeechNow is to influence elections through advocacy for or against the election of clearly identified candidates, but before it has made "expenditures" in excess of $1,000?*

    c. *After making "expenditures" in excess of $1,000?*

3. *What amount limitations apply to funds received by SpeechNow from individuals?*

Legal Analysis and Conclusions

Question 1: Are funds received and amounts disbursed by SpeechNow "contributions" and "expenditures" under 2 U.S.C. 431(8) and 431(9)?

Yes, funds received by SpeechNow would be contributions and amounts disbursed by SpeechNow would be expenditures under the Act and Commission regulations.

A. Contributions

Under the Act and Commission regulations, a "contribution" is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." *See* 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). The Act does not define the phrase "for the purpose of influencing any election for Federal office."

1 Commission regulations provide that funds received in response to solicitations
2 must be treated as contributions "if the communication indicates that any portion of the
3 funds received will be used to support or oppose the election of a clearly identified
4 Federal candidate."[2] 11 CFR 100.57(a); *see also Political Committee Status, Definition*
5 *of Contribution and Allocation for Separate Segregated Funds and Nonconnected*
6 *Committees; Final Rules*, 69 FR 68056, 68057 (Nov. 23, 2004) ("*Political Committee*
7 *Status Final Rules*").

8 SpeechNow proposes to solicit funds with two proposed communications,
9 Solicitation 1 and Solicitation 2, that contain identical language describing SpeechNow
10 and its purpose as follows:

11 SpeechNow.org is an independent speech group of individuals dedicated to
12 promoting and protecting our First Amendment rights to free speech and for the
13 freedom to assemble. We operate independently of any candidate and expressly
14 advocate to other people to vote for federal candidates who support these First
15 Amendment rights and to vote against candidates who oppose such rights.
16
17 Solicitation 1 and Solicitation 2 state that "the best way" to achieve SpeechNow's
18 purpose is:

19 to speak out when politicians and the voters are most likely to pay attention.
20 That's election time. We need to tell our fellow Americans who supports, and
21 who opposes, free speech and the First Amendment. We need to defeat some
22 candidates who are against free speech and elect the ones who support the First
23 Amendment. That will take money. A lot of it.
24
25 Solicitation 2 contains additional language stating that SpeechNow plans to run
26 advertisements to defeat two Federal candidates in 2008: Louisiana Senator Mary
27 Landrieu and Congressman Dan Burton from Indiana. Because Solicitation 2 indicates

[2] A Federal candidate is "clearly identified" if the candidate's name, nickname, photograph, or drawing appears in the communication, or if the identity of the candidate is otherwise apparent through an unambiguous reference to the person's status as a candidate, such as "the Democratic presidential nominee." *See* 11 CFR 100.17.

1 that funds received will be used to oppose the election of two Federal candidates clearly
2 identified by name, money received in response would constitute contributions under 11
3 CFR 100.57(a).

4 Because Solicitation 1 does not include an indication that the funds received in
5 response will be used to support or oppose the election of a clearly identified Federal
6 candidate, money received in response to Solicitation 1 would not constitute
7 contributions under 11 CFR 100.57(a). The Commission has emphasized, however, that
8 11 CFR 100.57 provides "one example of communications that can generate
9 contributions; it is not an exhaustive list. The rule addresses communications that
10 indicate that the funds received in response will be used to support or oppose the election
11 of a clearly identified Federal candidate. Other communications that do not include such
12 an indication may also generate contributions under FECA." *Political Committee Status*
13 *Final Rules*, 69 FR at 68058. Solicitation 1 asks individuals to give money to
14 SpeechNow so that SpeechNow can work to elect and defeat Federal candidates. Money
15 given to work to elect and defeat Federal candidates would be "for the purpose of
16 influencing any election for Federal office," and thus would constitute a contribution
17 under 2 U.S.C. 431(8)(A)(i) and 11 CFR 100.52(a).

18 In addition, any funds received from the four individuals who have indicated they
19 would like to give amounts ranging from $5,500 to $110,000 would also constitute
20 contributions under the Act and Commission regulations. Each individual acknowledges
21 in a signed declaration that he understands that funds given to SpeechNow "will be used
22 to fund speech, including advertisements that will advocate the election or defeat of
23 candidates to federal office based on their position on freedom of speech and campaign

1 finance laws." Accordingly, any such funds given to SpeechNow would be made "for the
2 purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR
3 100.52(a).

4 *B. Expenditures*

5 Under the Act and Commission regulations, an "expenditure," is a "purchase,
6 payment, distribution, loan, advance, deposit, or gift of money or anything of value, made
7 by any person for the purpose of influencing any election for Federal office." *See* 2
8 U.S.C. 431(9)(A)(i); 11 CFR 100.111(a). The Supreme Court has held that the term
9 "expenditure," when applied to communications made wholly independently of a
10 candidate or candidate's committee, includes only "expenditures for communications that
11 in express terms advocate the election or defeat of a clearly identified candidate for
12 federal office." *Buckley*, 424 U.S. *at* 44, 80.

13 Under Commission regulations, a communication contains express advocacy
14 when it uses phrases such as "vote for the President," "re-elect your Congressman," or
15 "Smith for Congress," or uses campaign slogans or words that in context have no other
16 reasonable meaning than to urge the election or defeat of one or more clearly identified
17 candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the
18 One," "Carter '76," "Reagan/Bush," or "Mondale!" *See* 11 CFR 100.22(a); *see also FEC*
19 *v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("*MCFL*") ("[The
20 publication] provides in effect an explicit directive: vote for these (named) candidates.
21 The fact that this message is marginally less direct than 'Vote for Smith' does not change
22 its essential nature"). Courts have held that "express advocacy also includes verbs that
23 exhort one to campaign for, or contribute to, a clearly identified candidate." *FEC v.*

Christian Coalition, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley*, 424 U.S. at 44 n.52, included the word "support," in addition to "vote for" or "elect," in its list of examples of express advocacy).

SpeechNow plans to fund the creation of four proposed political advertisements (the "Burton Ad," the "Alternative Burton Ad," the "Landrieu Ad," and the "Alternative Landrieu Ad") and pay to air them on television, independently of a candidate or a candidate's committee. All four advertisements contain audio and video content. The audio portions of the advertisements are as follows:

> *Burton Ad*:
> Free speech is so important, it's the First Amendment to the Constitution. But politicians like Dan Burton don't like free speech. Burton voted for a bill to restrict the speech of many public interest groups. Under this bill you could go to jail for criticizing politicians. Hey Dan Burton. This is America, not Russia. But we still have the right to vote. Say no to Burton for Congress. Say no to censorship.
>
> *Alternative Burton Ad*:
> We've all seen the fight for free speech around the world. Lately, free speech has come under attack right here in America. Thanks to politicians like Dan Burton. Burton voted for a bill to restrict the speech of many public interest groups. Under this bill you could go to jail for criticizing politicians. Our founding fathers made free speech the First Amendment to the Constitution. Dan Burton voted to restrict our rights. Don't let him do it again.
>
> *Landrieu Ad*:
> Free speech is so important, it's the First Amendment to the Constitution. But politicians like Mary Landrieu don't like free speech. Landrieu voted for the law restricting the speech of public interest groups. People can now go to jail for violating her law that protects politicians from criticism. Hey Mary Landrieu. This is America, not Russia. But we still have the right to vote. Say no to Landrieu for Senate. Say no to censorship.
>
> *Alternative Landrieu Ad*:
> We've all seen the fight for free speech around the world. Lately, free speech has come under attack right here in America. Thanks to politicians like Mary Landrieu. Landrieu helped pass the law restricting the speech of many public interest groups. Under this law you could go to jail for criticizing politicians.

1 Our founding fathers made free speech the First Amendment to the Constitution.
2 Mary Landrieu is taking that right away. Don't let her do it again.
3
4 The video portions of the Burton Ad and the Alterative Burton Ad both show a
5 picture of Congressman Burton and include text that states "Say no to Burton for
6 Congress." The video portions of the Landrieu Ad and the Alternative Landrieu Ad both
7 show a picture of Senator Landrieu and include text that states "Say no to Landrieu for
8 Senate."

9 The phrases "Say no to Burton for Congress" and "Say no to Landrieu for Senate"
10 constitute express advocacy under the Commission regulations because they have no
11 other reasonable meaning than to urge the defeat of the candidate clearly identified by
12 name and by picture. *See* 11 CFR 100.22(a). Accordingly, all four advertisements
13 contain express advocacy, and funds spent on these advertisements would constitute
14 expenditures under the Act and Commission regulations.

15 *Question 2: Must SpeechNow register as a political committee:*
16
17 *a. Before accepting "contributions," or making "expenditures," in excess of*
18 *$1,000 because its major purpose is to influence the election or defeat of*
19 *candidates for Federal office?*
20
21 *b. After it has received more than $1,000 from individuals who are informed*
22 *that the purpose of SpeechNow is to influence elections through advocacy*
23 *for or against the election of clearly identified candidates, but before it*
24 *has made "expenditures" in excess of $1,000?*
25
26 *c. After making "expenditures" in excess of $1,000?*
27
28 SpeechNow would have to register as a political committee once it has either
29 received contributions in excess of $1,000 or made expenditures in excess of $1,000, in a
30 calendar year, because it would satisfy the statutory definition of "political committee"
31 and its major purpose is Federal campaign activity. SpeechNow need not, however,

1 register as a political committee before receiving contributions or making expenditures
2 exceeding either of these thresholds solely because its major purpose is Federal campaign
3 activity.

4 *Definition of Political Committee*

5 The Act and Commission regulations, with certain exceptions, define a "political
6 committee" as "any committee, club, association, or other group of persons which
7 receives contributions aggregating in excess of $1,000 during a calendar year or which
8 makes expenditures aggregating in excess of $1,000 during a calendar year." *See* 2
9 U.S.C. 431(4)(A); 11 CFR 100.5(a). Under the Act and Commission regulations,
10 political committees are subject to certain registration and reporting requirements, as well
11 as limitations and prohibitions on contributions received and made. Once an organization
12 receives more than $1,000 in contributions or makes more than $1,000 in expenditures, in
13 a calendar year, it satisfies the statutory definition of "political committee."

14 The Supreme Court has held that "[t]o fulfill the purposes of the Act" and avoid
15 "reach[ing] groups engaged purely in issue discussion," only organizations whose major
16 purpose is Federal campaign activity can be considered political committees under the
17 Act. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for*
18 *Life, Inc.*, 479 U.S. 238, 262 (1986).

19 Accordingly, SpeechNow would have to register as a political committee if it
20 satisfies the statutory definition of "political committee" and its major purpose is Federal
21 campaign activity.

22 *A. Statutory Definition of "Political Committee"*

23 *1. Receiving contributions in excess of $1,000 in a calendar year*

1 As explained above in response to *Question 1*, funds received in response to
2 Solicitation 1 and Solicitation 2, and funds from the four individuals who would like to
3 give amounts ranging from $5,500 to $110,000, would constitute contributions under the
4 Act and Commission regulations. Thus, once SpeechNow receives more than $1,000 in a
5 calendar year in response to these solicitations, or from the four individuals, it would
6 meet the statutory definition of a "political committee."

7 *2. Making expenditures in excess of $1,000 in a calendar year*

8 As explained above in response to *Question 1*, SpeechNow's proposed political
9 advertisements contain express advocacy and funds spent on these advertisements would
10 be expenditures under the Act and Commission regulations. Thus, once SpeechNow
11 spends more than $1,000 in a calendar year on these advertisements, it would meet the
12 statutory definition of a "political committee."

13 *B. Major Purpose*

14 An organization's "major purpose" may be established through public statements
15 of purpose. *See, e.g.*, *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004)
16 (finding that the organization evidenced its "major purpose" through its own materials
17 which stated the organization's goal of supporting the election of Republican Party
18 candidates for federal office and through efforts to get prospective donors to consider
19 supporting federal candidates); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C.
20 1996) ("organization's [major] purpose may be evidenced by its public statements of its
21 purpose or by other means"); Advisory Opinion 2006-20 (Unity 08) (organization
22 evidenced its major purpose through organizational statements of purpose on Web site).

1 SpeechNow's major purpose is Federal campaign activity. SpeechNow makes
2 clear in its advisory opinion request, and through its proposed solicitations and other
3 proposed communications, that its "mission and major purpose is to advocate the election
4 of candidates . . . and advocating the defeat of candidates." Advocating the election and
5 defeat of candidates constitutes campaign activity.[3] In its Internal Revenue Service Form
6 8871 (Political Organization Notice of Section 527 Status), its bylaws, and its articles of
7 organization, SpeechNow clearly states this purpose: "We operate independently of any
8 candidate and expressly advocate to other people to vote for federal candidates who
9 support these First Amendment rights and vote against candidates who oppose such
10 rights." In addition, SpeechNow plans to continue making similar statements of its
11 purpose in its proposed solicitations, discussed above, which confirms that its major
12 purpose is Federal campaign activity.

13 Therefore, because its major purpose is Federal campaign activity, SpeechNow
14 would have to register as a political committee once it either (1) receives more than
15 $1,000 in a calendar year in response to its proposed solicitations or from the four
16 individuals who pledged donations, or (2) spends more than $1,000 in a calendar year on
17 its proposed advertisements. SpeechNow would have to file a statement of organization
18 within 10 days of becoming a political committee, *see* 11 CFR 102.1(d) and 102.2, and it
19 would be subject to all provisions of the Act and Commission regulations applicable to
20 political committees.

21 *Question 3: What amount limitations apply to funds received by SpeechNow from*
22 *individuals?*
23

[3] *See Buckley v. Valeo*, 424 U.S. 1, 79 (the term "political committee" encompasses organizations "the major purpose of which is the nomination or election of a candidate").

1 Because amounts given to SpeechNow would be contributions, as explained
2 above in response to *Question 1*, they would count towards the contribution limitations in
3 the Act and Commission regulations, including the individual biennial aggregate
4 contribution limit.

5 The Act and Commission regulations prohibit a person from making a
6 contribution in excess of $5,000 to a political committee that is not an authorized
7 committee, a political committee of a national political party, or a political committee of
8 a State political party. *See* 2 U.S.C. 441a(a)(1); 11 CFR 110.1(d). The Act and
9 Commission regulations also limit the total amount of contributions an individual may
10 make to candidates and political committees within a two-year period, known as the
11 individual aggregate biennial contribution limit. *See* 2 U.S.C. 441a(a)(3); 11 CFR
12 110.5(b)(1). Under the individual aggregate biennial contribution limit for the 2007-2008
13 election cycle, an individual may make no more than $108,200 in total contributions to
14 candidates and political committees, including up to $42,700 in contributions to political
15 committees that are not authorized committees and are not political committees of the
16 national political parties.[4] *See id.*; *Price Index Increases of Expenditure and*
17 *Contribution Limitations: Notice of Expenditure and Contribution Limitation Increases*,
18 72 FR 5294, 5295 (Feb. 2007).

19 Once SpeechNow becomes a political committee, it would not be an authorized
20 committee or a political committee of a national or State political party. *See* 2
21 U.S.C. 431(6) (definition of authorized committee); 11 CFR 100.5(e)(4) and (f)(1)
22 (definitions of authorized committee and party committee). Therefore, contributions to it

[4] These figures reflect the statutory figures adjusted to account for increases in the consumer price index. *See* 2 U.S.C. 441a(c)(1); 11 CFR 110.5(b)(3) and 110.17.

1 would be subject to the $5,000 amount limitation in 2 U.S.C. 441a(a)(1)(C) and 11 CFR
2 110.1(d) and would count towards the $42,700 in total contributions that each individual
3 may make to political committees that are not authorized committees and are not political
4 committees of the national political parties and the $108,200 in total contributions to all
5 candidates and political committees. *See* 2 U.S.C. 441a(a)(3); 11 CFR 110.5(b)(1).

6 Commission regulations prohibit a political committee from knowingly accepting
7 any contribution in excess of the Act's amount limitations, including the individual
8 biennial aggregate contribution limit. *See* 11 CFR 110.9. Accordingly, SpeechNow may
9 not accept any contribution that would cause an individual to exceed $5,000 in total
10 contributions to SpeechNow, $42,700 in total contributions to political committees that
11 are not authorized committees and are not political committees of the national political
12 parties, or $108,200 in total contributions to all candidates and political committees.

13 This response constitutes an advisory opinion concerning the application of the
14 Act and Commission regulations to the specific transaction or activity set forth in your
15 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
16 of the facts or assumptions presented and such facts or assumptions are material to a
17 conclusion presented in this advisory opinion, then the requester may not rely on that
18 conclusion as support for its proposed activity. The cited advisory opinion is available on
19 the Commission's website at http://saos.nictusa.com/saos/searchao.

20 Sincerely,
21
22
23 David M. Mason
24 Chairman